

November 5, 2015

2015 NOV -5 PM 2:54

Received
Federal Election Commission
Office of General Counsel

Jeff S. Jordan
Assistant General Counsel
Federal Election Commission
Office of Complaints Examination and Legal Administration
Attn: Frankie Hampton, Paralegal
999 E Street, NW
Washington, DC 20463

RECEIVED
FEC MAIL CENTER
2015 NOV -5 PM 2:16

Re: MUR 6962

Dear Mr. Jordan:

The complaint falsely alleges that Hillary for America ("HFA") and its employee, Molly Barker, violated federal campaign finance law. The Commission only appears to have sent a letter to Ms. Barker notifying her of the complaint; we have not seen a separate letter directed at HFA itself. Nonetheless, our response is in on behalf of both (collectively, "Respondents").

The violation alleged in the complaint is the product of an unsuccessful and illegal effort by an organization called Project Veritas to lure Ms. Barker into accepting \$35 from a foreign national to purchase campaign merchandise. The complaint lacks merit; fails to allege facts to support a violation of federal campaign finance law; and should be immediately dismissed. The Commission must send a clear message to Project Veritas that its deliberate effort to flout the law and entrap others will not be tolerated.

Background

On September 1, 2015, James O'Keefe, President and Founder of Project Veritas, unveiled footage gathered by an undercover investigator that he claimed would expose "illegal activity conducted by high-level employees within Hillary Clinton's presidential campaign."¹ Project Veritas describes itself as an investigative organization committed to exposing misconduct in public and private institutions in order to achieve a more ethical and transparent society.² Mr. O'Keefe previously pleaded guilty to violating federal law.³

¹ Tierney Sneed, *Reporters Scoff at James O'Keefe's Big New Scoop to Destroy Hillary*, Talking Points Memo, Sept. 1, 2015, <http://talkingpointsmemo.com/dc/james-okeefe-hillary-video>.

² Project Veritas, *About*, <http://www.projectveritas.com/about>.

³ Ramon Antonio Vargas, *James O'Keefe and friends plead guilty in Mary Landrieu office caper*, New Orleans Times-Picayune, May 26, 2010, http://www.nola.com/crime/index.ssf/2010/05/james_okeefe_and_friends_plead.html.

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The video depicts an attempt by a Canadian citizen to purchase fundraising merchandise at the June 13, 2015 launch of HFA.⁴ A Project Veritas employee waiting in line to purchase merchandise had a conversation with a woman and was told by the woman that she was from Canada.⁵ The Canadian citizen asked HFA staff members selling merchandise if she could make a purchase; in response, one HFA staff member told the Canadian citizen that “we can’t take contributions from anyone that is not a citizen of the United States.”⁶ In a blatant effort to encourage an illegal act, the Project Veritas employee urged the HFA staff member to accept the contribution, stating “[b]ut she traveled all the way from Canada to support Hillary, you could give her, she’s paying cash.”⁷ The HFA staff member continued to politely refuse the contribution, stating “[i]t’s not my rule, I’m very sorry.”⁸ The Canadian citizen then asked if she could provide funds to the Project Veritas staff member who, in turn, would purchase the merchandise for her.⁹ The HFA staff member told the Canadian citizen that the Project Veritas employee, a U.S. citizen, “could make a donation” but that a U.S. citizen cannot make purchases using the funds of a foreign national.¹⁰ The Project Veritas employee then purchased the merchandise. At a subsequent press conference, both Mr. O’Keefe and the group’s attorney claimed that some or all of the funds used by the Project Veritas employee to purchase the merchandise were provided by the Canadian citizen, though they did not agree on the amount.¹¹

Legal Discussion

The complaint alleges that Ms. Barker knowingly accepted a contribution from a foreign national in violation of 52 U.S.C. § 30121 and knowingly accepted a contribution made in the name of another person in violation of 52 U.S.C. § 30122. In fact, the undercover video footage shows the opposite: Ms. Barker correctly identified that the campaign is prohibited from accepting contributions from foreign nationals and refused to accept the intended contribution. When Ms. Barker accepted the payment from the Project Veritas employee, she had no knowledge that the employee would seek reimbursement from the Canadian citizen. It was the Project Veritas employee, not Ms. Barker, who violated federal law and must be held accountable.

To violate either provision of the statute identified in the complaint, an individual must “knowingly solicit, accept, or receive” the impermissible contribution.¹² It is well accepted that the term knowingly “requires proof of knowledge of the facts that constitute the offense.”¹³ It is inarguable that Ms. Barker made a good-faith effort to comply with the law and resisted multiple requests to accept a contribution from a foreign national. Upon learning that the

⁴ Project Veritas Action, *Hidden Cam: Hillary’s National Marketing Director Illegally Accepting Foreign Contribution* (Sept. 1, 2015), <https://www.youtube.com/watch?v=-qx7Z2N7Y4> (last visited Nov. 4, 2015).

⁵ *Id.* at 1:46-1:55.

⁶ *Id.* at 2:00-2:12.

⁷ *Id.* at 2:12-2:17.

⁸ *Id.* at 2:20.

⁹ *Id.* at 2:46.

¹⁰ *Id.* at 2:48-2:58.

¹¹ Kira Lerner, *James O’Keefe Releases Video Attacking Clinton Campaign — For Letting A Canadian Buy A T-Shirt*, Think Progress, Sept. 1, 2015, <http://thinkprogress.org/politics/2015/09/01/3697540/okeefe-video-clinton-campaign/>.

¹² 52 U.S.C. §§ 30121, 30122 (emphasis added).

¹³ *Bryan v. United States*, 524 U.S. 184, 193 (1998).

prospective contributor was from Canada, Ms. Barker immediately sought the assistance of another staff member, alerting the second staff member that “she’s Canadian and so we can’t take”¹⁴ The second staffer confirmed that “we can’t take contributions from anyone that is not a citizen of the United States.”¹⁵ After the Project Veritas employee attempted to badger Ms. Barker into accepting the contribution,¹⁶ the campaign staffer once again politely refused to accept it.¹⁷ Then, in the campaign staff’s fourth recitation of the restriction, Ms. Barker started to state that “the Federal Election Commission requires,” before the Project Veritas employee interrupted.¹⁸ It is clear from the footage that Ms. Barker was aware of the rule, applied it properly, and acted in observance of the statute.

When Ms. Barker eventually accepted the contribution from the Project Veritas employee, Ms. Barker was accepting a contribution made by a U.S. citizen. After Ms. Barker refused to accept the contribution from the Canadian citizen, Ms. Barker stated, again correctly, that the (U.S. citizen) Project Veritas employee “could make a donation.”¹⁹ While the video includes a side conversation between the Project Veritas employee and the Canadian citizen in which they discuss making a different transaction – with the Canadian citizen asking the Project Veritas employee “can you buy it for me?” and the Project Veritas employee responding “sure, I’ll buy it”²⁰ – there is no evidence that Ms. Barker heard this side conversation.²¹ The audio of the undercover footage demonstrates that there was a lot of background noise surrounding the merchandise tent. The footage does not show Ms. Barker acting with knowledge that the contribution was being made by the Canadian citizen or in the name of another.

Ms. Barker also lacked the requisite mental state because the Project Veritas employee attempted to lure her into participating in a campaign finance violation that she had no predisposition to commit.²² Alternatively, the transaction can be viewed as the product of misrepresentation, fraud, and illegality by the Project Veritas employee.²³ Demonstrating this point, Project Veritas immediately sought to retract its titular donation to HFA.²⁴ In various contexts beyond federal campaign finance law, these features of a transaction or investigation negate voluntariness or an individual’s culpability.²⁵ Clearly, the same principle should apply here.²⁶

¹⁴ Project Veritas Action, *Hidden Cam: Hillary’s National Marketing Director Illegally Accepting Foreign Contribution* at 2:02 (Sept. 1, 2015), <https://www.youtube.com/watch?v=qxF7Z2N7Y4> (last visited Oct. 29, 2015).

¹⁵ *Id.* at 2:08-2:14.

¹⁶ *Id.* at 2:15-2:19.

¹⁷ *Id.* at 2:21-2:26.

¹⁸ *Id.* at 2:42-2:47.

¹⁹ *Id.* at 2:47-2:49.

²⁰ *Id.* at 2:49-2:51.

²¹ *See id.*

²² *See Sorrells v. United States*, 287 U.S. 435, 443-45 (1932) (“When the criminal design originates, not with the accused, but is conceived in the mind of the government officers, and the accused is by persuasion, deceitful representation, or inducement lured into the commission of a criminal act, the government is estopped by sound public policy from prosecution therefor.”).

²³ *See generally* Restatement (Second) of Contracts §§ 7, 163.

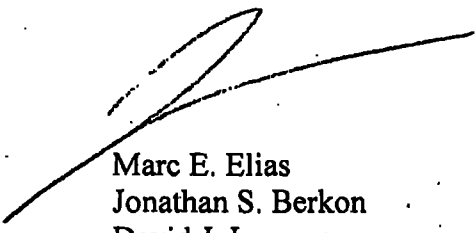
²⁴ Alex Seitz-Wald, *James O’Keefe wants his \$35 back from Hillary Clinton*, Sept. 1, 2015, MSNBC, <http://www.msnbc.com/msnbc/james-okeefe-wants-his-35-back-hillary-clinton>.

²⁵ *See generally Kellogg Brown & Root Servs., Inc. v. United States*, 99 Fed. Cl. 488, 514 (2011) *aff’d*, 728 F.3d 1348 (Fed. Cir. 2013).

²⁶ *See generally Staples v. United States*, 511 U.S. 600, 615-16 (1994).

As Stop Hillary PAC has presented a frivolous claim based on a fraudulent donation of less than \$40, and failed to present any facts supporting the allegations that Ms. Barker or HFA violated the Act, the Commission should dismiss the complaint.

Very truly yours,



Marc E. Elias
Jonathan S. Berkon
David J. Lazarus

Counsel to Respondents



FEDERAL ELECTION COMMISSION
999 E Street, NW
Washington, DC 20463

Received
Federal Election Commis
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2015 NOV -5 PM 2:57

STATEMENT OF DESIGNATION OF COUNSEL
Please use one form for each Respondent/Entity/Treasurer
FAX (202) 219-3923

MUR # 5962

NAME OF COUNSEL: Marc E. Elias; Jonathan Berkon; David Lazarus

FIRM: Perkins Cole

ADDRESS: 700 13th Street N.W. Suite 600

Washington, D.C. 20005

TELEPHONE- OFFICE (202) 654-6200

FAX () **Web Address** www.perkinscole.com

The above-named individual and/or firm is hereby designated as my counsel and is authorized to receive any notifications and other communications from the Commission and to act on my behalf before the Commission.

11/4/15
Date

Molly Barker
Respondent/Agent-Signature

Senior Director of Marketing
Title (Treasurer/Candidate/Owner)

RESPONDENT: Molly Barker
(Committee Name, Company Name, or Individual Named in Notification Letter)

MAILING ADDRESS: P.O. Box 5256
(Please Print)

New York, New York 10185

TELEPHONE- HOME (435) 720-3274

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Information is being sought as part of an investigation being conducted by the Federal Election Commission and the confidentiality provisions of 2 U.S.C. § 437g(a)(12)(A) apply. This section prohibits making public any investigation conducted by the Federal Election Commission without the express written consent of the person under investigation